(1) No. 88-163

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

COMBUSTION ENGINEERING, INC., *et al.*,

Petitioners,

vs.

ARSENIO C. SAPORITO, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Whether former employees who are not eligible to receive benefits from an early retirement incentive plan offered subsequent to their retirement may be "participants" with statutory standing to sue under ERISA, 29 U.S.C. § 1132(a)(3)?

PARTIES TO THE PROCEEDING

Petitioners, appellees in the United States Court of Appeals for the Third Circuit, are Combustion Engineering, Inc. (hereinafter "CE" or the "Company") and Charles E. Hugel, Donald C. Taylor, Sven A. Kreipke and C.L. Bekkedahl, corporate officials. CE has no parent corporation; significant subsidiaries and affiliates are listed below.[1]

Respondents, appellants in the Court of Appeals, are a group of 32 former employees of CE who elected to take early retirement in February, 1985.[2]

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1. Impell Pacific; Lummus Alireza Ltd., Co.; Vetco Sanitec; Vetco Saudi Arabia; Vetco Coating, GmbH; Vetco Enterprise, A.G.; Tylinter, Inc.

2. Arsenio C. Saporito, Pasquale F. Ambrosio, Alfred Grant Baum, Frederick Betz, Rose Bochicchio, William Floyd Burroughs, Amerigo Burruano, Edwin B. Carlson, William F. Cheperak, George F. Crowley, Vernon D. Davis, John Francis DeMar, Fred Diamond, Norma Lee Dyer, Murray S. Gottlieb, Svante Humbla, Edward F. Jedzinick, Alda Yvonne Kyle, Charles Philip Marion, Lois Marshall, Richard Martone, Peter James Mikedes, Anthony J. Morrell, Per Olof Einer Reich, Robert Robie, Harold Rodriguez, Tim Shaunfield, Mary S. Siegel, Richard Iver Swartz, Morris Swerlin, Huan Yin Wang, and Jess V. Ziccarello.

TABLE OF CONTENTS

Page

Question Presented i

Parties to the Proceeding ii

Table of Contents iii

Table of Citations iv

Opinions Below 2

Statement of Jurisdiction 2

Statutory Provisions Involved 2

Statement of the Case 4

Reasons for Granting the Writ 6

I. The issue of the scope of participant status under ERISA is now pending before the Court in another case in which certiorari has been granted. 6

II. The decision below is contrary to the clear language of the statute and conflicts with the decisions of other courts of appeals as to the proper definition of "participant" and the standing requirement of 29 U.S.C. § 1132. 7

Conclusion 14

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975) 9

Chevron, U.S.A., Inc. v. National Resources Defense Council, 467 U.S. 837 (1984) 9

Firestone Tire & Rubber Co., et al. v. Bruch, et al., 828 F.2d 134 (3d Cir. 1987), cert. granted, 108 S. Ct. 1288 (1988) 6, 7, 9, 13, 14

Freeman v. Jacques Orthopaedic & Joint Implant Surgery Medical Group, Inc., 721 F.2d 654 (9th Cir. 1983) 10

Jackson v. Sears, Roebuck & Co., 648 F.2d 225 (5th Cir. 1981) 10

Joseph v. New Orleans Electrical Pension and Retirement Plan, 754 F.2d 628 (5th Cir.), cert. denied, 474 U.S. 1006 (1985) 10

Kuntz v. Reese, 785 F.2d 1410 (9th Cir. 1986), cert. denied, 107 S. Ct. 318 (1987) 9, 10

Mountain States Telephone & Telegraph Co. v. Pueblo of Santa Ana, 472 U.S. 237 (1985)..... 9

Nugent v. Jesuit High School, 625 F.2d 1285 (5th Cir. 1980) 9, 11, 12

Contents

Page

Saladino v. ILGWU National Retirement Fund, 754 F.2d 473 (2d Cir. 1985) 9, 12, 13

Santa Fe Industries, Inc. v. Green, 430 U.S. 462 (1977) 9

Stanton v. Gulf Oil Corp., 792 F.2d 432 (4th Cir. 1986) 11

Weiss v. Sheet Metal Workers Local No. 544 Pension Trust, 719 F.2d 302 (9th Cir. 1983), cert. denied, 466 U.S. 972 (1984) 12

Statutes Cited:

18 U.S.C. § 1961 4

18 U.S.C. § 1961(5) 5

28 U.S.C. § 1254(1) 2

29 U.S.C. § 1002(7) 2, 8, 11

29 U.S.C. §§ 1021-1031 9

29 U.S.C. § 1024 ..... 6, 8, 13

29 U.S.C. § 1025 ..... 8, 13

29 U.S.C. § 1132 ..... 3, 6, 7, 11, 13

Contents

Page

29 U.S.C. § 1132(a) 4

29 U.S.C. § 1132(a)(2) 11

29 U.S.C. § 1132(a)(3) .....i, 5, 8, 11, 14

29 U.S.C. § 1132(c) 1, 8

29 U.S.C. § 1132(g) 8

29 U.S.C. § 1140 .....3, 4, 5, 8, 10, 11, 13

29 U.S.C. § 1141 8

Other Authorities Cited:

29 C.F.R. § 2510.3-3(d)(3)(i) 9

29 C.F.R. 2610.2(a)(2) 9

APPENDIX

Appendix A — Order of the United States Court of Appeals for the Third Circuit Denying Petition for Rehearing Dated April 29, 1988 ..... 1a

Appendix B — Opinion of the United States Court of Appeals for the Third Circuit Filed March 29, 1988 ..... 3a

Appendix C — Judgment of the United States Court of Appeals for the Third Circuit Dated March 29, 1988 ..... 32a

Contents

Page

Appendix D — Order of the United States District Court for the District of New Jersey Granting Motion for Summary Judgment Dated January 29, 1987 ..... 35a

Appendix E — Letter Opinion of the United States District Court for the District of New Jersey Dated January 29, 1987 ..... 37a

Appendix F — Opinion of the United States District Court for the District of New Jersey Dated December 3, 1986 ..... 40a

No.

In The

Supreme Court of the United States

October Term, 1988

COMBUSTION ENGINEERING, INC., *et al.*,

Petitioners,

v.

ARSENIO C. SAPORITO, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners respectfully pray that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on March 29, 1988. The Court of Appeals, reversing an order dismissing respondents' complaint entered by the United States District Court for the District of New Jersey, determined that respondents, who had retired from the Company, had standing to sue under the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1132(c) ("ERISA"), for alleged

interference with their right to obtain subsequently offered retirement benefits.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 843 F.2d 666 (3a-31a). The opinions of the United States District Court for the District of New Jersey are unreported (37a-49a).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on March 29, 1988 (32a-34a). A timely petition for rehearing and rehearing en banc was denied by the Court of Appeals on April 29, 1988 (1a-2a), and this petition for certiorari was timely filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 29:

§ 1002 - DEFINITIONS

> (7) The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

§ 1132 - CIVIL ENFORCEMENT

(a) Persons empowered to bring a civil action

A civil action may be brought —

(3) by a participant, beneficiary, or fiduciary (a) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (b) to obtain other equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan; . . .

§ 1140 - INTERFERENCE WITH PROTECTED RIGHTS

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act [29 U.S.C.A. § 301, et seq.], or for the purpose of interfering with the attainment of any right to which such participant may become eligible under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter or the Welfare and Pension Plans Disclosure Act.

The provisions of section 1132 of this title shall be applicable in the enforcement of this section.

STATEMENT OF THE CASE

Respondents were employees of CE who elected early retirement in February 1985 under a Voluntary Early Separation Plan ("VESP") and received all of the early retirement benefits due them under that Plan (7a-8a). Respondents allege that petitioners improperly induced them to elect retirement under VESP by failing to inform them, while selectively informing others, that an enhanced early retirement plan ("VSIP") would subsequently be offered (8a-9a). The VSIP plan was first offered to employees in May 1985, approximately three months after respondents had retired under VESP. The Company thereafter denied respondents' requests to participate in VSIP (8a-9a).

Respondents filed suit in the district court under the Employee Retirement Income Security Act, 29 U.S.C. § 1132(a), alleging that they were "participants" in VSIP because they would have elected to retire under VSIP "but for" the Company's failure to disclose its plans to offer VSIP, and that the Company had unlawfully interfered with their opportunity to participate in VSIP (Count II).[3]

Upon petitioner's motion to dismiss, the district court initially

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3. Although not clearly set forth in the complaint, the interference allegation has been argued by respondents to allege a violation of ERISA Section 510, 29 U.S.C. § 1140 (10a). Respondents also alleged in their complaint that they were "participants" in VESP and that petitioners breached a fiduciary duty owed to them under ERISA as VESP participants by failing to disclose their plans to offer VSIP (Count I); and that the Company violated the provisions of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, *et seq.*, ("RICO") by the alleged fraudulent failure to disclose information concerning VSIP (Count III).

determined that respondents had or could have standing to sue under ERISA based upon their allegation that CE disclosed VSIP information to others but not to them (47a).[4] On motion for reconsideration, the district court dismissed respondents' ERISA claims (Counts I and II) based on its determination that respondents were not "participants" in either VESP or VSIP and therefore had no standing to sue under ERISA (37a-39a).

On appeal, the Court of Appeals upheld the district court's determination that respondents were not "participants" in VESP, and therefore had no standing to sue for beach of fiduciary duty (Count I), since they had received all of the VESP benefits to which they were entitled (11a-14a). However, the court reversed the district court's decision as to Count II based on its determination that respondents had standing to sue as "potential participants" (5a-6a) who "would have been participants" in VSIP "but for" the Company's failure to inform them about the plans to offer VSIP (14a-16a). The court observed that "[t]o require that the employees have the status of participant where they allege that the employers' acts effectively deprived them of such status would undercut the provision [§ 1140] and cannot have been intended by Congress."(16a). Accordingly, the court concluded that respondents had standing under § 1132(a)(3) to establish "that they would have been participants" in VSIP "but for" the Company's conduct (14a, 16a).

A petition for rehearing and rehearing en banc was denied, and petitioners now seek review in this Court.

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4. The district court dismissed respondents' RICO claim (Count III) based upon its determination that respondents failed to allege a "pattern" of racketeering activity as required under 18 U.S.C. § 1961(5) (47a-49a). On appeal, the Third Circuit reversed as to the "pattern" requirement and remanded the issue to allow respondents to amend their complaint to more specifically plead their fraud allegations (17a-29a). The court's RICO determination is not now before this Court.

REASONS FOR GRANTING THE WRIT

I.

THE ISSUE OF THE SCOPE OF PARTICIPANT STATUS UNDER ERISA IS NOW PENDING BEFORE THE COURT IN ANOTHER CASE IN WHICH CERTIORARI HAS BEEN GRANTED.

The decision of the Court of Appeals below expanding the definition of "participant" and the statutory limit on standing under ERISA is similar to an earlier decision of the same court in *Firestone Tire & Rubber Co., et al. v. Bruch, et al.*, No. 87-1054, in which the court ruled that the plaintiffs-appellants were "participants" in Firestone's pension plan for purposes of standing to bring an action under ERISA § 1024 for plan information even though none of the plaintiffs were employees at the time they made their claim and none were entitled to receive any benefits under the plan other than those already received. 828 F.2d 134, 136 (3d Cir. 1987). Firestone appealed and certiorari was granted on April 4, 1988 (108 S. Ct. 1288).

The Third Circuit's decision in *Bruch*, like its decision in the instant case, improperly expanded the statutory definition of "participant" and the standing limitations set forth in § 1132. Thus, the plaintiffs in *Bruch* were former employees of Firestone who made demands for plan information under § 1024 of the Act and thereafter brought suit for damages against the plan administrator under § 1132. Although as former employees they were not eligible for benefits under the plan and could not "become eligible" for such benefits, the court ruled that the statutory definition of "participant" should be interpreted to include "those who claim to be but in fact are not" entitled to benefits under a plan. 828 F.2d at 153. The court determined that individuals who were not eligible to receive benefits and could not meet the

"may become eligible" requirement should nevertheless have standing to bring suit to obtain plan information so that they might possibly establish their eligibility and standing. *Id.* at 152-153.

In the instant case, the respondents retired three months before the VSIP plan was offered and had no standing to sue under ERISA since they were not eligible to receive VSIP benefits and could not meet the "may become eligible" requirement. Nevertheless, as it had in *Bruch*, the Court of Appeals ignored the clear statutory language and expanded the definition of "participant" to include those who claim that they "would have been" eligible for benefits but for some alleged act of the plan administrators.

Because the issue presented here concerning the statutory interpretation of "participant" and the scope of the standing limitation of ERISA is virtually identical to the issue now before the Court in *Bruch*, petitioners respectfully pray that their writ be granted so that the Court may completely resolve this matter.

II.

THE DECISION BELOW IS CONTRARY TO THE CLEAR LANGUAGE OF THE STATUTE AND CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO THE PROPER DEFINITION OF "PARTICIPANT" AND THE STANDING REQUIREMENT OF 29 U.S.C. § 1132.

"Participant" is defined under ERISA as:

> . . . any employee or former employee of an employer . . . *who is or may become eligible* to receive a benefit of any type from an employee benefit plan which covers employees of such employer. . . .

[Emphasis added; 29 U.S.C. § 1002(7)]. This definition is of critical importance in the administration of the Act since many of the rights and benefits provided under ERISA are available only to "participants" in a given plan. Thus, "participants" have the right to obtain plan information (29 U.S.C. § 1024), benefit reports (§ 1025) and attorney's fees [(§ 1132(g)], to claim damages from plan administrators [§ 1132(c)], to seek protection from interference and coercion (§§ 1140 and 1141), and to bring civil actions to recover benefits or enforce the provisions of the Act [§ 1132(c)].

In the instant case, the Court of Appeals held that former employees who could not otherwise meet the statutory definition of "participant" may have standing under ERISA "to demonstrate that they would have been participants" in a plan offered subsequent to their retirement (16a).[5] In so holding, the court has ignored the statutory definition of "participant" and has improperly expanded the statutory standing provision by finding that anyone who claims that he would have or might have been a participant in a plan qualifies as a "participant" under ERISA. This unwarranted expansion of the definition of "participant" is contrary to congressional intent as reflected in the plain language of the statute, and conflicts with the decisions of every other circuit which has considered the issue. Moreover, the court, by expanding the definition of "participant", has virtually eliminated the standing requirement of § 1132(a)(3) and thus has exposed employers and plan administrators to claims and demands from individuals not contemplated under the Act.

That the Court of Appeals' holding below is contrary to the

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5. In reality, the Court of Appeals has defined "participant"as anyone who alleges that they *might have been* eligible for benefits since it is only a matter of conjecture that any of the respondents who retired in February 1985 would have remained employed and become eligible for VSIP benefits when that plan was offered in May 1985.

intent of the legislature as reflected in the plain language of the Act is clear.[6] By limiting "participant" status to those who are or "may become eligible" to receive a benefit, Congress clearly manifested its intent to confer rights and protections only on those who could establish a clear relationship to a plan. The Third Circuit's decision below — as well as its decision in *Bruch* — confers such status on former employees who did not, and never could, have a relationship to the plan in question and who could not even raise a colorable claim that they could ever become eligible to receive a benefit from that plan. In so holding, the Court of Appeals has rendered meaningless the "may become eligible" provision of the statutory definition of "participant" contrary to the proper canons of statutory construction. *Mountain States Telephone & Telegraph Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985).[7]

In misreading the statute and congressional intent, the Third Circuit has taken a position which conflicts with the decisions

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6. The language of the statute itself must be the "starting point" in any matter of statutory construction. *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 472 (1977), *quoting Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J. concurring).

7. The Court's decision is also at odds with the definition of "participant" found in the relevant regulations promulgated by the Department of Labor and the Pension Benefit Guarantee Corporation as the agencies delegated by Congress to enforce and apply ERISA. *See* 29 U.S.C. §§ 1021-1031. The applicable regulations specifically limit "participant" status to those covered employees with continued eligibility to receive benefits. 29 C.F.R. §§ 2510.3-3(d)(3)(i) and 2610.2(a)(2)(1984). Such agency interpretations are entitled to great weight [*Chevron, U.S.A., Inc. v. National Resources Defense Council*, 467 U.S. 837, 844 (1984)] and were specifically relied upon by the other circuits in reaching their interpretations of the statutory definition of "participant". *See, e.g., Kuntz v. Reese*, 785 F.2d 1410, 1412 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 318 (1987); *Saladino v. ILGWU National Retirement Fund*, 754 F.2d 473, 476-477 (2d Cir. 1985); *Nugent v. Jesuit High School*, 625 F.2d 1285, 1288 n.9 (5th Cir. 1980).

of the other circuits which have addressed the issue of participant status. Other circuits have uniformly required that claimants meet the statutory "participant" status requirement in order to establish standing to sue under the Act. In *Jackson v. Sears, Roebuck & Co.*, 648 F.2d 225, 227-229 (5th Cir. 1981), the Fifth Circuit rejected a former employee's claim under § 1140 that "but for" her discharge from employment she would have become eligible to receive subsequently offered pension benefits. There, as here, the employee was not vested in the plan at the time of her separation from employment because that plan, while proposed, did not exist at that time. The court concluded that despite her "but for" allegation the employee had no standing since she was not — and could never become — a "participant" in the plan from which she claimed benefits. *See also, Joseph v. New Orleans Electrical Pension and Retirement Plan*, 754 F.2d 628 (5th Cir.), *cert. denied*, 474 U.S. 1006 (1985) (former employees who received all of their benefits from a plan had no standing since they were no longer "participants" in that plan).

Similarly, in *Freeman v. Jacques Orthopaedic & Joint Implant Surgery Medical Group, Inc.*, 721 F.2d 654, 656 (9th Cir. 1983), the Ninth Circuit concluded that an employee who had voluntarily waived his right to participate in his employer's pension plan had no standing to assert a claim that his waiver had been fraudulently induced. The court there observed that nothing the employee alleged could alter the fundamental fact that he was not a "participant" since he was not, and could not become, eligible for a benefit under the plan, and concluded that it "did not believe that Congress intended to open the doors to this type of plaintiff when ERISA's jurisdictional provisions were drafted" limiting standing to "participants". *See also, Kuntz v. Reese*, 785 F.2d 1410 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 318 (1987) (no standing to claim breach of fiduciary duty where former employees had received all of their benefits and were therefore not "participants" since they were no longer eligible to receive benefits).

The Fourth Circuit has also rejected a former employee's "but for" claim to standing in circumstances similar to those in the instant case. In *Stanton v. Gulf Oil Corp.*, 792 F.2d 432, 434-435 (4th Cir. 1986), the employee alleged that he elected early retirement based on representations made by his employer that it had no plans to enhance its existing early retirement benefit package. When the retirement plan was subsequently enhanced, the employee raised a claim for such benefits and filed suit alleging breach of fiduciary duty. The court determined that the former employee could not be a participant in the subsequently offered plan and observed that to allow standing based on such a claim would inappropriately open the litigation door to anyone who simply made a claim to benefits.[8]

Contrary to the Court of Appeals below, the other circuits have also consistently applied the same definition of "participant" to claims asserted under other provisions of the Act, and have uniformly required that claimaints meet the "may become eligible" requirement in order to establish "participant" status. Thus, the Fifth Circuit has held that the "may become eligible" provision was meant to apply only to current employees whose vesting rights would occur in the future and not to former employees whose eligibility could only arise as a result of re-employment. *Nugent*

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8. The Court of Appeals below attempted to distinguish *Stanton* based on the fact that the claim in that case did not concern an allegation of interference under § 1140 (15a-16a n.7). But this ignores the fact that the Fourth Circuit's opinion is based on the definition of "participant" under § 1002(7) for purposes of standing to sue under § 1132(a)(2); the same definition under which respondents assert standing in the instant case. 792 F.2d at 434-435. Moreover, the court's attempt to distinguish *Stanton* ignores *Jackson, supra,* which did arise under § 1140, as well as the fundamental fact that there is only one definition of "participant" under the Act, and that the same definition applies to claims under § 1140 as under § 1132. Indeed, the protections of § 1140 are specifically applicable only to "participants" as opposed to "persons" or "claimants", and only "participants" have standing to raise a § 1140 claim in court. *See* § 1132(a)(3).

v. Jesuit High School, 625 F.2d 1285, 1287 (5th Cir. 1980) (former employee may not raise a claim to obtain plan information or recover damages from the plan administrator). The Ninth Circuit has limited "participant" status to those former employees who demonstrate "a reasonable expectation of returning to covered employment" or a "colorable claim to vested benefits". *Weiss v. Sheet Metal Workers Local No. 544 Pension Trust,* 719 F.2d 302, 303 (9th Cir. 1983), *cert. denied,* 466 U.S. 972 (1984) (former employee who is not a "participant" has no right to receive plan information). Similarly, the Second Circuit has held that a "former employee who has neither a reasonable expectation of returning to covered employment nor a colorable claim to vested benefits . . . simply does not fit within the term 'may become eligible' " and may not assert the rights of a "participant" under the Act. *Saladino v. ILGWU National Retirement Fund,* 754 F.2d 473, 476 (2d Cir. 1985) (former employees may not obtain plan information for the purpose or determining whether they are eligible for benefits).

Finally, the Court of Appeals' expansive definition of "participant" will have serious consequences for employers and plan administrators within the Third Circuit. Such employers may now be exposed to litigation from any former employee who seeks to obtain pension or retirement benefits offered subsequent to his or her separation from employment and who asserts a claim that "but for" some action — or inaction — on the part of his former employer, he might have remained employed and might have become eligible to receive the later benefits.[9] In addition, under the court's expansive definition of "participant"— both

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9. The Third Circuit did not place any limitations on a former employee's right to make a claim for subsequently offered benefits. Thus, there is nothing in the court's opinion to prevent former employees from raising a claim for benefits offered many years after their separation from employment so long as they merely claim that they would have remained employed but for the employer's alleged actions.

here and in *Bruch* — plan administrators may be burdened with requests for plan information or benefits reports — and the litigation which follows — from individuals who merely "claim", even without any colorable basis, that they are or might have been participants. Such a burden will prove to be extremely costly and is clearly contrary to the plain language of the Act. *See Saladino v. ILGWU National Retirement Fund*, 754 F.2d at 476.[10]

10. As shown above, *supra*, p. 11 n. 8, and contrary to the position apparently taken by the court below, there is only one definition of "participant" under the Act and it applies to the protections provided under § 1140 as well as to the rights under §§ 1024 and 1025 or the standing requirements under § 1132.

CONCLUSION

The decision of the Court of Appeals below interpreting the statutory definition of "participant" so broadly as to virtually eliminate the participant standing requirement of § 1132(a)(3) presents an important issue almost identical to that which is currently pending before this Court in *Firestone Rubber & Tire Co. v. Bruch*. The decision below warrants review by this Court also because it is in clear conflict with the intent of Congress, as reflected in the plain language of the Act, as well as the decisions of the other circuits, and exposes employers and plan administrators to unwarranted demands and litigation. Accordingly, the Court should grant the petition, reverse the judgment of the court below and restore clarity and uniformity to the law governing employee rights under ERISA.

Respectfully submitted,

RICHARD C. MARIANI
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Attorneys for Petitioners

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING DATED APRIL 29, 1988

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-5144

ARSENIO C. SAPORITO, PASQUALE F. AMBROSIO, ALFRED GRANT BAUM, FREDERICK BETZ, ROSE BOCHICCHIO, WILLIAM FLOYD BURROUGHS, AMERIGO BURRUANO, EDWIN B. CARLSON, WILLIAM F. CHEPERAK, GEORGE F. CROWLEY, VERNON D. DAVIS, JOHN FRANCIS DeMAR, FRED DIAMOND, NORMA LEE DYER, MURRAY S. GOTTLIEB, SVANTE HUMBLA, EDWARD F. JEDZINIAK, ALDA YVONNE KYLE, CHARLES PHILIP MARION, LOUIS MARSHALL, RICHARD MARTONE, PETER JAMES MIKEDES, ANTHONY J. MORRELL, PER OLOF EINER REICH, ROBERT ROBIE, HAROLD RODRIGUEZ, TIM SHAUNFIELD, MARY S. SIEGEL, RICHARD IVER SWARTZ, MORRIS SWERLIN, HUAN YIN WANG, JESS V. ZICCARELLO,

Appellants

v.

COMBUSTION ENGINEERING INC., CHARLES E. HUGEL, DONALD C. TAYLOR, SVEH A. KREIPKE and C. L. BEKKEDAHL,

Appellees

(D.C. Civil No. 86-1998)

Appendix A

SUR PETITION FOR PANEL REHEARING AND REHEARING IN BANC

PRESENT: GIBBONS, *Chief Judge,* SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN and ROSENN,* *Circuit Judges.*

The petition for rehearing filed by appellees in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is DENIED.

BY THE COURT,

s/ Becker
Circuit Judge

Dated: APR 29 1988

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* As to panel rehearing only.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED MARCH 29, 1988

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-5144

ARSENIO C. SAPORITO, PASQUALE F. AMBROSIO, ALFRED GRANT BAUM, FREDERICK BETZ, ROSE BOCHICCHIO, WILLIAM FLOYD BURROUGHS, AMERIGO BURRUANO, EDWIN B. CARLSON, WILLIAM F. CHEPERAK, GEORGE F. CROWLEY, VERNON D. DAVIS, JOHN FRANCIS DeMAR, FRED DIAMOND, NORMA LEE DYER, MURRAY S. GOTTLIEB, SVANTE HUMBLA, EDWARD F. JEDZINIAK, ALDA YVONNE KYLE, CHARLES PHILIP MARION, LOUIS MARSHALL, RICHARD MARTONE, PETER JAMES MIKEDES, ANTHONY J. MORRELL, PER OLOF EINER REICH, ROBERT ROBIE, HAROLD RODRIGUEZ, TIM SHAUNFIELD, MARY S. SIEGEL, RICHARD IVER SWARTZ, MORRIS SWERLIN, HUAN YIN WANG, JESS V. ZICCARELLO,

Appellants

v.

COMBUSTION ENGINEERING INC., CHARLES E. HUGEL, DONALD C. TAYLOR, SVEH A. KREIPKE and C.L. BEKKEDAHL,

Appellees

Appendix B

On Appeal From the United States District Court
for the District of New Jersey
(D.C. Civil No. 86-1998)

Argued October 5, 1987

Before: BECKER, SCIRICA and ROSENN,
Circuit Judges

(Filed March 29, 1988)

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Appendix B

OPINION OF THE COURT

BECKER, *Circuit Judge*.

This is an appeal from the district court's dismissal of the complaint of thirty-two former employees of Combustion Engineering, Inc. ("C-E") which alleged that C-E and four of its officers (collectively "appellees"), induced appellants to retire under one retirement plan while at the same time concealing from them but disclosing to certain other employees the development of a second, more generous plan. The complaint claimed that appellees thereby breached fiduciary duties under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 301-1461 (1982), and violated the civil provisions of the Racketeer Influenced and Corrupt Organizations Act ("civil RICO"), 18 U.S.C. §§ 1961-1968 (1982).[1]

The appeal presents two ERISA questions. The first question is whether appellants, having received all the benefits to which they were entitled under the first plan, were no longer "participants" in the plan as required for standing to sue for breach of fiduciary duty under ERISA § 502(a), 29 U.S.C. 1132(a) (1982). We conclude that they were not and will therefore affirm the district court's dismissal of Count I. The second question is whether appellants, having retired under the first plan (not knowing about the second) nonetheless have standing to sue as potential

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1. Although the district court referred to the dismissal in its letter memorandum as a summary judgment, the dismissal was based on the pleadings and the parties agree that it was in fact a dismissal under Fed. R. Civ. P. 12(b)(6), hence we will treat it as such on appeal.

participants in the second plan, and, whether appellees' actions constitute discrimination against appellants in violation of ERISA § 510, 29 U.S.C. § 1140, for the purpose of denying benefits to which they were or would have become entitled. We conclude that appellants have standing because their allegations, if proved, would demonstrate that appellants would have been participants in the second plan but for C-E's actions, which effectively tricked them into retirement under the first plan while secretly informing other employees of the second, more lucrative, plan. Because appellants should have an opportunity to flesh out their § 510 claim, we will remand the case to the district court for further proceedings on that claim.

The appeal also presents several RICO questions. The first question is whether appellants have alleged fraud with particularity as required under Fed. R. Civ. P. 9(b), which is made applicable by the RICO jurisprudence. We conclude that the complaint failed to allege fraud with sufficient particularity, but that appellants should be allowed to amend the complaint. The second question is whether appellants have alleged a "pattern" of racketeering activity. Applying this court's recent decisions in *Barticheck v. Fidelity Union Bank/First National State*, 832 F.2d 36 (3d Cir. 1987), and *Marshall-Silver Constr. Co. v. Mendel*, 835 F.2d 63 (3d Cir. 1987), we determine that appellants' allegations of multiple inducements to retire made to at least thirty-two individuals over an extended period of time met the pattern requirement. The third question is whether C-E can be both an enterprise and a person liable under civil RICO. Appellants pleaded that C-E was an "enterprise" under § 1962, but under § 1962(c) only "persons" may be held liable, and a corporation may not be both a person and an enterprise under § 1962(c). The language of § 1962(a) differs, however,

and a corporation may be both an enterprise and a person under that subsection. Because of a lack of specificity in the complaint, we are unable to determine whether it alleged a violation of 18 U.S.C. § 1962(c) or of § 1962(a), and thus we are unable to determine whether the complaint against C-E must be dismissed. For all these reasons we will reverse and remand the district court's dismissal of Count III (the civil RICO count).

I. FACTS AND PROCEDURAL HISTORY

Arsenio C. Saporito and the thirty-one other plaintiff-appellants are all former employees of C-E who receive monthly pension benefits under C-E's corporate-wide salaried pension plan, entitled the C-E Retirement Plan for Salaried Employees ("the Corporate Plan"), and who in February 1985, took early retirement pursuant to C-E's Voluntary Early Separation Plan ("VESP"). Because the complaint was dismissed on the pleadings, we will treat the allegations in the complaint as true. *See Labov v. Lalley*, 809 F.2d 220, 221-22 (3d Cir. 1987); *Wisniewski v. Johns-Manville Corp.*, 759 F.2d 271, 273 (3d Cir. 1985).

C-E first notified its employees of VESP on or about February 4, 1985. Employees had until February 15, 1985 to join the plan, which entailed retiring by February 28, 1985. The VESP plan was offered to employees of the C-E Engineering and Construction Group working in New Jersey, Oklahoma, and Texas. Under VESP, the employees received, in addition to pension and other benefits to which they were already entitled under the Corporate Plan, a special lump-sum separation payment.[2] According to appellants, they

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2. The amount of the lump-sum special separation payment was determined in accordance with the following schedule:

accepted the terms of VESP because C-E and its officers threatened or implied that appellants would be laid off if they did not accept the plan. The parties agree that C-E did subsequently lay off some employees. All of the appellants accepted VESP, retired effective February 28, 1985, and received the benefit payments to which they were entitled under the plan.

Appellants allege that at the same time C-E was encouraging appellants to join the VESP, C-E was actively planning to promulgate another early retirement plan, the Voluntary Separation Incentive Plan ("VSIP"), to be offered to certain employees after the expiration of the VESP election period. C-E unveiled VSIP and offered it to C-E employees on May 20, 1985. VSIP provided for significantly greater benefits than the earlier VESP, including unreduced early retirement benefits, surviving spouse benefits, supplemental pension benefits, and free medical and dental benefits.[3]

YEARS OF SERVICE	*NUMBER OF WEEKS OF SEPARATION PAYMENT*
0-4	8
5-8	10
9-12	12
13-16	14
17-20	16
21-24	18
25-28	20
29-32	22
33-36	24
37-40	26
41-44	28
45 & Over	30

3. According to appellants' complaint, the benefits listed below were offered in the VSIP plan but not in the VESP plan:

Unreduced Early Retirement Benefits - Electing participants received their full pension benefit from the

Appendix B

Appellants also allege that during the election period for VESP, C-E "and/or persons acting under [its] direction or control" informed certain employees other than the appellants that the more valuable VSIP would be offered shortly after the expiration of VESP. J.A. at 45. According to appellants, they were not informed about VSIP, but would have been eligible and eager to participate had they been given the opportunity. After learning of VSIP, appellants requested to participate in the plan, but C-E denied these requests.

C-E Salaried Plan earned as of their separation date with no reduction for early commencement of payments. This improvement increased their benefits approximately 5% for employees age 61 to as much as 25% for employees age 53 to age 55.

Surviving Spouse Benefits - Electing participants received surviving spouse benefits under the C-E Salaried Plan without any reduction in their full pension benefit.

Supplemental Pension Benefit - Electing participants received a supplemental pension benefit equal to $20 per month for each year of service, with a minimum benefit of $3,120 per year ($260 per month), and a maximum benefit of $4,800 per year ($400 per month).

Retiree Medical and Dental Benefits - Retiree medical and dental benefits were provided without charge to all electing participants and their eligible dependents.

Life Insurance Benefits - Retiree life insurance coverage equal to $100 per year of service up to a maximum of $2,500 was provided.

Thrift Investment Plan - Electing participants received a distribution of their entire Thrift Account and Tax Savings Account including the full Company match.

J.A. at 47-48.

Appendix B

Appellants subsequently filed a three count complaint, asserting two ERISA claims and one civil RICO claim. Count I alleged that appellants were participants in the VESP plan; that C-E and the individual defendants are administrators and fiduciaries of VESP under ERISA; and that C-E and the individual defendants breached their fiduciary duty to appellants by: (1) withholding information about the development of the VSIP plan, which "was material and necessary to [appellants] in determining whether or not to participate in VESP"; and (2) divulging such information to other C-E employees. J.A. at 49.

In Count II appellants alleged that they were participants in VSIP because "but for" C-E's misrepresentations, appellants would have refused the VESP offer and would have elected to join VSIP. Although Count II did not specify which ERISA section was thereby violated, appellants argued before the district court and argue here that C-E's actions violated ERISA § 510, 29 U.S.C. 1140, which prevents employers from interfering with rights to which employees may become entitled under ERISA. In effect, appellants alleged that C-E's actions interfered with their opportunity to participate in the VSIP plan. Appellants claimed damages for Counts I and II equal to the difference in the value between the benefits of the two plans, plus punitive damages, interest, attorneys' fees, and costs.

Finally, Count III alleged that the individual defendants used the mails and telephone to prevent the appellants from participating in VSIP, which constituted acts of mail and wire fraud amounting to a pattern of racketeering activity under 18 U.S.C. § 1961(5). Count III further alleged that such racketeering activity on the part of the individual defendants violated 18 U.S.C. § 1962, which prohibits conducting or participating in the affairs of an

enterprise (C-E) through racketeering activity. Appellants also alleged that the enterprise itself violated § 1962 by engaging in a pattern of racketeering activity. Appellants sought treble damages, costs and attorneys fees from the individual appellees and C-E itself in the civil RICO count.

C-E and the individual defendants moved to dismiss all counts pursuant to Fed. R. Civ. P. 12(b)(6). The district court granted the motion as to the civil RICO count (Count III), but at first rejected C-E's motion to dismiss the ERISA counts, presumably because appellants' allegation that C-E had informed certain other employees (but not appellants) of the forthcoming VSIP plan, if supported, would enable appellants to have standing under ERISA as participants of VSIP.[4] On motion for reconsideration, however, the district court dismissed the ERISA counts (I and II).[5] This appeal followed.

II. THE ERISA COUNTS

A. *Breach of Fiduciary Duty* (Count I)

Because the district court dismissed the case on the pleadings, *see supra* n.1, we must "determine whether in the light most favorable to [the appellants] 'it appears beyond doubt that the [appellants] can prove no set of facts in support of [their] claim which would entitle [them] to relief.'" *Paolino v. Channel Home*

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4. The district court stated that: "Plaintiffs allege C-E disclosed the planning and development of VSIP to other C-E employees allowing those chosen employees to make a choice between VESP or VSIP. Because the allegations in a complaint are to be accepted as true, Plaintiffs should be allowed to proceed further with the litigation." J.A. at 23-24.

5. The court stated that it had "improvidently included" its statement regarding appellants' allegations that C-E disclosed information about the development of the VSIP plan to certain employees and "recalled" the statement.

Centers, 668 F.2d 721, 722 (3d Cir. 1981) (quoting *Conley v. Gibson*, 355 U.S. 41, 45 (1957)). Our review of an order dismissing a complaint involves a question of law and is therefore plenary. *D.P. Enterprises v. Bucks County Community College*, 725 F.2d 943, 944 (3d Cir. 1984).

In Count I, appellants alleged that they were participants in the VESP plan, and that C-E and the individual defendants breached their fiduciary duties by disclosing the development of VSIP to select employees while at the same time coercing appellants into retirement to prevent them from receiving the greater benefits of VSIP. The district court dismissed the count on the ground that appellants had elected to take retirement under VESP, and that C-E had no fiduciary duty to disclose information about VSIP because it "was only in the planning stages at the time of [appellants'] retirement." J.A. at 6. However, the district court did not address the question whether C-E breached a fiduciary duty by revealing the development of the VSIP to certain employees but not appellants. On appeal, appellants raise two questions pertaining to the dismissal of Count I, only one of which requires discussion, namely, were appellants "participants" in VESP for the purposes of standing?

Under ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), a civil action for the breach of a fiduciary duty may be brought by the Secretary of Labor or a plan "participant, beneficiary or fiduciary." Similarly, ERISA § 502(a)(1), 29 U.S.C. § 1132(a)(1), restricts civil actions against a plan administrator to actions brought by a "participant or beneficiary." The requirement that the plaintiff be a plan participant is both a standing and subject matter jurisdictional requirement. *Molnar v. Wibbelt*, 789 F.2d 244, 247 (3d Cir. 1986); *Stanton v. Gulf Oil Corp.*, 792 F.2d 432, 434 (4th Cir. 1986).

Appendix B

ERISA § 3(7) defines "participant" to include:

> any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

29 U.S.C. § 1002(7). C-E contends that appellants do not qualify as participants in the VESP because they have received all of the benefits to which they are entitled under the VESP plan in a lump sum. We agree.

As a general rule, employees who take early retirement and elect to receive lump sum retirement benefits do not have standing to seek the increased payment later made to retirees or to challenge changes in the retirement plan. *See Kuntz v. Reese*, 785 F.2d 1410 (9th Cir.), *cert. denied*, 107 S. Ct. 318 (1986); *Yancey v. American Petrofina, Inc.*, 768 F.2d 707 (5th Cir. 1985); *Joseph v. New Orleans Elec. Pension & Retirement Plan*, 754 F.2d 628 (5th Cir.), *cert. denied*, 474 U.S. 1006 (1985). Appellants respond that because they all are receiving on-going pension benefits under the Corporate Plan in addition to the lump sum payments received under VESP, they are participants in VESP. However, in order to have standing here, appellants must allege that they are participants in VESP, not in the underlying corporate pension plan. VESP consisted entirely of a lump sum payment to employees, based on the number of years of employment. *See supra* p. 5. The Corporate Plan was a separate pension plan which existed before VESP was offered and which has continued after VESP expired. Thus although the appellants are participants in the Corporate Plan, they no longer are participants in the

VESP. We will therefore affirm the order of the district court dismissing appellants' Count I.

We turn next to the heart of appellants' complaint. that such actions amounted to an attempt to interfere with appellants' rights to future benefits in VSIP in violation of ERISA § 510. 29 U.S.C. § 1140.

B. *ERISA § 510 (Count II)*

Appellants contend that C-E discriminated against them in violation of ERISA § 510. 29 U.S.C. § 1140. by telling other employees of the second plan. while at the same time inducing appellants to retire. Appellants assert that they would have been participants in VSIP "but for" C-E's fraudulent activity. and thus that they have standing as VSIP participants. The district court dismissed Count II because the court determined that appellants "did in fact elect early retirement so as to become beneficiaries of the VESP plan" and. because they were not participants in VSIP. they had no standing to claim that C-E interfered with their rights under VSIP.

ERISA § 510 prohibits employers from penalizing employees with the purpose of interfering with certain benefits to which they are or may become entitled. Section 510 provides in pertinent part:

> It shall be unlawful for any person to discharge. fine. suspend. expel. discipline. or discriminate against a *participant or beneficiary* for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan . . . .

29 U.S.C. § 1140 (emphasis added).

C-E contends that the appellants are not participants in or beneficiaries of VSIP "since they

voluntarily retired prior to the time VSIP existed and nothing they allege can change the fact that they were not eligible to participate in VSIP at the time it was offered."[6] Appellee's Br. at 24. C-E's contention, however, begs the question: appellants allege not just that C-E failed to inform them of the VSIP, but that C-E coerced the appellants into retiring while providing information to some other employees and thus, in essence, tricked the appellants into retiring early. If they had not been tricked, the argument continues, they would have been participants in the VSIP plan. Therefore, the issue is not whether appellants should be denied standing because they retired "voluntarily," but rather, whether appellants have standing for the purposes of demonstrating that they were tricked into retiring, and thus would have been eligible for participation in VSIP. Appellants contend that but for the selective divulgence of information, they would have been members of VSIP, and, for the purposes of standing to bring an action under ERISA, should be considered as such. We agree with this contention.

This is not an instance where plaintiffs simply alleged that the employer did not inform the employees of a plan in development. Instead, appellants here argue that C-E induced appellants to retire under the VESP, while secretly informing some individuals of the more lucrative VSIP.[7] By its very nature, a § 510 claim will often involve employees who claim that they did not

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6. C-E also contends that the claim is "without merit" because the complaint does not specifically reference § 510. We disagree. The complaint, in Count II, clearly provides notice of the nature of the claim and that the claim was made under ERISA. Moreover, appellants raised the § 510 arguments during the proceedings before the district court as well as on appeal.

7. C-E argues that the Court of Appeals for the Fourth Circuit rejected just such a "but for" participation status in Stanton v. Gulf Oil Corp., 792 F.2d 432 (4th Cir. 1986). However, *Stanton* is

receive benefits because of the employers' actions, and thus were denied an opportunity to become "participants" in the benefits. To require that the employees have the status of participant where they allege that the employers' acts effectively deprived them of such status would undercut the provision and cannot have been intended by Congress.

We therefore conclude that appellants have standing to demonstrate that they would have been participants absent C-E's actions.[8] Because of the procedural posture of the case, the appellants have not fleshed out the elements of their § 510 claim, and it is not for us to do so here.[9] We note, however, that we

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distinguishable because it did not involve a § 510 action, and because the plaintiff there urged the court to consider him to be a participant because he would have been such but for future events under his control. The plaintiff did not sustain his claim that the employer misled him into opting to retire. Appellants, on the other hand, allege that they would have been participants but for C-E's selective divulgence of information about VSIP, and at the pleading stage we must assume their ability to prove it.

8. *See* Garry v. TRW, Inc., 603 F. Supp. 157, 162 (N.D. Ohio 1985) ("The fact that TRW paid Garry all that he was entitled to at the time of his discharge is not dispositive of the questions of whether Garry would have been entitled to more benefits if he had not been discharged, or whether a reduction in benefits was a reason for his discharge."); *cf.* Bruch v. Firestone Tire and Rubber Co., 828 F.2d 134, 151-53 (3d Cir. 1987) (participant status for the purposes of standing under ERISA § 502(c) regarding provision of information "would most sensibly extend both to people who are in fact entitled to a benefit under the plan and to those who claim to be but in fact are not").

9. *See* Gavalik v. Continental Can Co., 812 F.2d 834, 852 (3d Cir.) (employees alleging discrimination in § 510 actions must make out a *prima facie* case, much like Title VII actions: "an employee must demonstrate (1) prohibited employer conduct (2) taken for the purpose of interfering (3) with the attainment of any right to which the employee may become entitled"), *cert. denied*, 108 S. Ct. 495 (1987).

have not determined that appellants will be able to establish a violation of § 510, only that they have standing to pursue it.[10] We will therefore reverse the judgment and remand for further proceedings regarding Count II consistent with this opinion.

III. CIVIL RICO

A. *Introduction*

To survive a Rule 12(b)(6) motion, a civil RICO claim must allege "(1) the conducting of, (2) an enterprise, (3) through a pattern, (4) of racketeering activity." *Marshall-Silver Constr. Co. v. Mendel*, 835 F.2d 63, 65 (3d Cir. 1987) (citing *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985)). Count III of appellant's complaint alleges that by intimidating appellants with threats of an immediate layoff and by pressuring them into accepting VESP benefits while revealing the development of a second, more generous plan to other employees, C-E engaged in a pattern of racketeering activity in violation of civil RICO, 18 U.S.C. § 1962. C-E challenged the civil RICO count by maintaining that appellants failed to meet the RICO pattern requirement, 18 U.S.C. § 1962.

The district court granted C-E's motion to dismiss the RICO claim, impliedly holding that more than one "scheme" is required to comprise a pattern of racketeering activity: the court concluded that "if anything[, appellants] have alleged multiple acts in furtherance of a single scheme." J.A. at 26. On appeal,

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10. *Compare* Greenblatt v. Budd Co., 666 F. Supp. 735, 740 (E.D. Pa. 1987) (harassment intended to force employee to retire is actionable under § 510) *with* UAW v. Park-Ohio Indus., Inc., 661 F. Supp. 1281, 1304 (N.D. Ohio 1987) (misrepresentations regarding decision to retire are not actionable under § 510 because "§ 510's purpose is to protect the employment relationship," not retirement decisions).

appellants contend that the district court erred in requiring more than one scheme. C-E makes three arguments in response: (1) that appellants failed to allege fraud with specificity as required under Fed. R. Civ. P. 9(b); (2) that the district court properly dismissed Count III because appellants failed to allege a sufficient civil RICO pattern; and (3) that the complaint was properly dismissed as to C-E, because the company cannot be both an enterprise and a person liable under civil RICO. We consider these contentions in turn.

B. *The § 9(b) Pleading Requirement*

Appellants allege that defendants used the mails and telephone in their scheme to defraud them and in doing so committed mail and wire fraud under 18 U.S.C. §§ 1341 and 1343. Appellants allege that each such use of the mails or telephone constituted a predicate act of racketeering activity as defined in civil RICO § 1961(1), 18 U.S.C. § 1961(1).[11] Because these predicate acts are acts of fraud, they must be pleaded with particularity under Fed. R. Civ. P. 9(b). *Seville Indus. Mach. Corp. v. Southmost Mach. Corp.*, 742 F.2d 786 (3d Cir. 1984), *cert. denied*, 469 U.S. 1211 (1985).

At bottom, appellants' allegation of fraud is as follows: "Upon information and belief, defendants and/or persons acting under their direction or control provided notice to certain C-E employees other than plaintiffs, during the VESP option period, that C-E was in the process of planning and promulgating VSIP."

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11. Section 1961(1) states in pertinent part: "As used in this chapter -- (1) 'racketeering activity' means... (B) any act which is indictable under any of the following provisions of title 18, United States Code:... Section 1341 (relating to mail fraud), section 1343 (relating to wire fraud). . . ." 18 U.S.C. § 1961(1) (1982).

Appendix B

J.A. at 45.[12] C-E argues that the district court's dismissal of the civil RICO count should be affirmed because appellants' averment of fraud failed to meet the Fed. R. Civ. P. 9(b) pleading requirements. Specifically, C-E maintains that appellants' allegation of fraud is deficient because it does not give sufficient

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12. Appellant's civil RICO count further alleges:

> 64. Defendants each willfully failed or refused to disclose the existence of and imminent offering of VSIP to plaintiffs during the opt-in period.
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> 65. Defendants or persons acting under their direction or control did provide notice that C-E was in the process of planning and promulgating VSIP to certain C-E employees other than plaintiffs during the opt-in period who, on the basis of the information provided to them, declined to participate in VESP and instead waited and elected to participate in VSIP.
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> 66. Defendants' willful omission of such material and relevant information to plaintiffs during the VESP opt-in period was done with the specific intention of inducing plaintiffs to elect to participate in VESP, and to prevent them from obtaining the benefits they were entitled to under VSIP.
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> . . . .
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> 69. Defendants' conduct in failing or refusing to disclose material information to each of the plaintiffs during the opt-in period with the intention of inducing each of the plaintiffs to elect to participate in VESP and to prevent plaintiffs from obtaining the benefits offered under VSIP and by disclosing to certain C-E employees other than plaintiffs the existence and imminent offering of VSIP during the VESP opt-in period each constitutes a separate and distinct violation of their fiduciary obligations to plaintiffs and a scheme or artifice to defraud plaintiffs within the meaning of 18 U.S.C. § 1341.

J.A. at 55-57.

indication of what acts constituted fraud, such as which defendants were involved, what was said, or the time and place of the statements.

Fed. R. Civ. P. 9(b) states: "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally." The circuits have differed in their treatment of Rule 9(b) and civil RICO predicate acts.[13] This court addressed the issue in

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13. The First Circuit in New England Data Serv., Inc. v. Becher, 829 F.2d 286 (1st Cir. 1987), adopted a somewhat lenient approach, holding that although Rule 9(b) requires pleading fraud in RICO cases with the same specificity as required in other cases, where plaintiff's allegations make it likely that a claim will be made out and where information is in the exclusive control of defendant, dismissal is improper without further discovery. *Id.* at 290.

Other circuits have strictly applied the Rule 9(b) pleading requirement to allegations of civil RICO fraud. *See, e.g.*, Blount Fin. Serv., Inc. v. Walter E. Heller & Co., 819 F.2d 151, 152 (6th Cir. 1987)("Fraud alleged in a RICO civil complaint ... must state with particularity the false statement of fact made by the defendant which the plaintiff relied on and the facts showing the plaintiff's reliance on defendant's false statement of fact."); Schreiber Distrib. Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1401 (9th Cir. 1986)(pleadings must "state the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations"); Bender v. Southland Corp., 749 F.2d 1205, 1216 (6th Cir. 1984)("To satisfy FRCP 9(b), a plaintiff must at minimum allege the time, place and contents of the misrepresentation(s) upon which he relied.").

In Haroco, Inc. v. American Nat'l Bank & Trust Co., 747 F.2d 384, 404-05 (7th Cir. 1984), *aff'd per curiam*, 473 U.S. 606 (1985), the Seventh Circuit rejected the argument that a fraud pleading must be as specific as a criminal bill of particulars and determined that the Rule 9(b) particularity requirement was met where "the complaint adequately specified the transactions, the content of the allegedly false representations, and the identities of those involved."

Seville Indus. Mach. Corp. v. Southmost Mach. Corp., 742 F.2d 786 (3d Cir. 1984), *cert. denied*, 469 U.S. 1211 (1985).

The district court in *Seville* had dismissed the complaint on the ground that it failed, *inter alia*, to meet the Fed. R. Civ. P. 9(b) pleading requirements. The plaintiff, an industrial machinery trader, alleged that the defendants induced it to enter into several contracts for the purpose of selling and re-selling industrial machinery, and that because of the defendant's fraudulent misrepresentations it shipped seven hundred pieces of machinery to the defendants without receiving payment. The district court found that the allegations of fraud were deficient because they "did not describe the date, place or time of the phone calls and letters that defendants allegedly used in furtherance of their fraudulent scheme." *Seville*, 742 F.2d at 791. The district court also held that because the complaint failed to allege when the transportation of goods occurred, the plaintiffs failed properly to plead the interstate component of the claim.

We reversed, noting that "in applying Rule 9(b), 'focusing exclusively on its "particularity language" is too narrow an approach and fails to take account of the general simplicity and flexibility contemplated by the rules.'" *Seville*, 742 F.2d at 791 (quoting *Christidis v. First Pennsylvania Mortgage Trust*, 717 F.2d 96, 100 (3d Cir. 1983)(quoting 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1298, at 407 (1969))). We also pointed out that the plaintiffs had specified the machinery in great detail, and, more importantly for the case *sub judice*, that "[t]he complaint set[] forth the nature of the alleged misrepresentations, and while it d[id] not describe the precise words used, each allegation of fraud adequately describe[d] the nature

and subject of the alleged misrepresentation." *Seville*, 742 F.2d at 791. As an example of the adequate description, we quoted a paragraph from the complaint:

> [Defendants] [r]epresented to [plaintiff] that if the industrial machinery listed in Exhibits A and C were shipped on consignment to either [of the defendants], that the industrial machinery would be resold, and that the purchase price paid by [plaintiff] for this equipment along with a 50% pro rata share of the profits resulting from resale would be distributed and paid back to [plaintiff].

Id. at 791 n.6.

Neither party in the case *sub judice* cited *Seville*. Appellants maintain that because the 18 U.S.C. § 1341 and § 1343 "scheme to defraud" element of civil RICO fraud "is not defined according to any technical standards. . . . [and] need not be fraudulent on its face," we should find the allegation of fraud sufficient. *United States v. Pearlstein*, 576 F.2d 531, 535 (3d Cir. 1978). Appellants misconstrue the meaning of the pleading requirement, however. The pleading requirement simply mandates that the actions establishing the fraud be pleaded with greater particularity than other pleadings; it has no impact on the definition of fraud itself. Thus, Rule 9(b) does not alter the substantive offense of fraud, but requires detailed allegations of that offense.

That detail is lacking here. The complaint in *Seville* indicated who made the representations to whom, and the general content of the representations. Although the appellants' complaint does indicate the general content of the representations ("notice that C-E was in the process of planning and promulgating

VSIP"),[14] it does not indicate who the speakers were ("defendants *and/or persons acting under their direction and control*") or who received the information ("*certain C-E employees* other than plaintiffs").[15] J.A. at 56-58 (emphasis added).

Although we, too, are mindful of the admonition in *Christidis*, relied upon in *Seville*, not to read the particularity requirement too narrowly, the pleadings before us do not provide even the level of notice that we pointed out in *Christidis* is the underpinning of the particularity requirement. *See Christidis*, 717 F.2d at 100. Moreover, there is no reason to believe that additional information is in the exclusive control of

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14. Appellants maintain that because "the Complaint alleges that defendants actively induced plaintiffs to opt for the VESP retirement plan while withholding information about the VSIP plan, and at the same time divulging such information to other selected employees," it meets the pleading requirement. Appellants' Reply Br. at 14.

15. *Cf.* Schreiber Distrib. Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1401 (9th Cir. 1986), where the complaint found insufficient to meet the 9(b) requirements alleged:

> [T]he Defendants Serv-Well, Landmark, John W. Lee and James A. Lee have engaged in racketeering activity ... by engaging on two or more occasions the use of the United States mail and/or use of interstate telephone calls for the purpose of executing or attempting to execute the aforesaid fraudulent scheme ... all of which conduct or acts are indictable under the provisions of Title 18, United States Code, Section 1341 (relating to mail fraud) and Section 1343 (relating to wire fraud).

The allegations describing fraud in the other paragraphs of the complaint had not mentioned use of the mails or telephones, and thus the court concluded that the pleadings failed to meet the Rule 9(b) requirement that "the pleader must state the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations." *Id.*

C-E. *See New England Data Serv., Inc.*, 829 F.2d at 289. Hence, we hold that the appellants' allegations are insufficient to meet the particularity requirement of Rule 9(b).

Because appellants should have an opportunity to amend the complaint to provide greater specificity, *see* Fed.R.Civ.P. 15; *District Council 47 v. Bradley*, 795 F.2d 310, 316 (3d Cir. 1986), we will remand with instructions to the district court to grant leave to amend. *See New England Data Serv., Inc.*, 829 F.2d at 290 (Rule 9(b) requires specific allegations of fraud in civil RICO cases, but "the court should make a *second* determination as to whether the claim as presented warrants the allowance of discovery and if so, thereafter provide an opportunity to amend the defective complaint")(emphasis in original); *Ray v. Karris*, 780 F.2d 636, 645 (7th Cir. 1985)(allowing amendment of pleadings following failure to make sufficient civil RICO allegations).

B. *The RICO "Pattern" Requirement*

Because appellants may be able to amend Count III to allege fraud with the requisite particularity, we will consider whether appellants have sufficiently pleaded a "pattern" of racketeering activity. RICO § 1961(5) states that a "'pattern of racketeering activity' requires at least two acts of racketeering activity." 18 U.S.C. § 1961(5). These predicate racketeering acts may include, among others, any acts that are indictable under the federal mail fraud (18 U.S.C. § 1341) and wire fraud (18 U.S.C. § 1343) statutes. 18 U.S.C. § 1961(1)(Supp. III 1985).

In its now famous and somewhat opaque *Sedima* footnote, the Supreme Court stated:

> The legislative history supports the view that two isolated acts of racketeering do not constitute a

> pattern. As the Senate Report explained: "The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of *continuity plus relationship* which combines to produce a pattern." S. Rep. No. 91-617, p. 158 (1969) (emphasis added).

Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 496 n.14 (1985). The courts have since divided as to the footnote's meaning.

Some courts have interpreted the Supreme Court's language as an invitation to restrict the reach of civil RICO by requiring that to comprise a pattern the predicate acts must include multiple schemes, or continuity demonstrated by ongoing or open-ended activity. *See, e.g., Superior Oil Co. v. Fulmer*, 785 F.2d 252, 257 (8th Cir. 1986) (requiring multiple fraudulent schemes); *Northern Trust Bank/O'Hare v. Inryco, Inc.*) 615 F.Supp. 828, 832-33 (N.D. Ill. 1985) (requiring more than a single scheme). This court, however, has examined the pattern requirement in two recent opinions, *Barticheck v. Fidelity Union Bank/First National State*, 832 F.2d 36 (3d Cir. 1987), and *Marshall-Silver Construction Co. v. Mendel*, 835 F.2d 63 (3d Cir. 1987), and has rejected the notion that at least two schemes must be alleged and that they must be ongoing or open-ended.

In *Barticheck*, the defendants were a drilling partnership, a bank, and two officers of the bank. The plaintiffs, investors in the partnership, alleged that the organizers of the partnership had pre-existing debts to the bank, and that only by selling interests in the partnership could funds be raised to pay off the debt. The plaintiffs alleged that the partnership, acting in concert with the bank officers, materially

misrepresented the risks involved in the partnership and the extent of the bank's financing of the partnership. The plaintiffs borrowed all or nearly all of the purchase price of their shares in the partnership from the bank, which did not follow routine loan procedures. Partnership interests turned out to be worthless, and plaintiffs sued, charging that the partnership organizers, with help from bank officers, had defrauded the plaintiffs in violation of civil RICO and state law. The district court dismissed the complaint on the pleadings, holding that the complaint failed to allege a RICO pattern.

We reversed, rejecting the notions that more than one scheme must be alleged and that a scheme must be ongoing or open-ended, and concluded that a case-by-case analysis should be undertaken to determine "the extent of the racketeering activity." *Barticheck*, 832 F.2d at 40. We indicated that a determination of whether the facts alleged comprise a RICO pattern with the requisite "continuity plus relationship," *Sedima*, 473 U.S. at 496 n.14, turns on a combination of the following factors: (1) the number of unlawful acts; (2) the length of time over which the acts were committed; (3) the similarity of the acts; (4) the number of victims; (5) the number of perpetrators; and (6) the character of the unlawful activity. *Id.* at 39. We held that the complaint met the RICO pattern requirement because its allegations of a scheme carried out by several individuals and two entities (the bank and the partnership), whose misrepresentations were repeated to roughly twenty individuals, "certainly comports with the ordinary understanding of" the word "pattern." *Id.*

In *Marshall-Silver*, filed a month after *Barticheck*, we upheld a dismissal for failure to allege a sufficient pattern. In *Marshall-Silver*, a general contractor alleged that over the course of a year the defendants --

an engineering firm, its officers, and a law firm of which the officers were members -- fraudulently forced the general contractor into bankruptcy. According to the general contractor, the engineering firm subcontracted with the general contractor, but because the engineering firm's performance was late and was of poor quality the general contractor refused to pay. The engineering firm's officers thereupon confronted the general contractor regarding payment and wrote two letters threatening to destroy the general contractor unless it paid the engineering firm for the work. The defendants subsequently filed a petition for involuntary bankruptcy against the general contractor and contacted the press in order to publicize the filing of the petition. The press reported that the general contractor was bankrupt, leading to its inability to obtain needed construction bonds. The general contractor alleged that the defendants knew the petition was false, and alleged that the petition and subsequent publicity led ultimately to the destruction of its business. The bankruptcy court later dismissed the petition.

We held that these facts did not meet the *Barticheck* pattern requirement, noting that "[t]he target of the RICO statute, as its name suggests, is criminal activity that, because of its organization, duration, and objectives poses, or during its existence posed, a threat of a series of injuries over a significant period of time." *Marshall-Silver*, 835 F.2d at 66-67. We concluded that the facts failed to meet the pattern requirement because they comprised allegations of an activity that involved a single victim and a single injury, and that involved a single, short lived scheme with only two active perpetrators. *Id.* at 67. An examination of the instant case in light of the several factors enumerated in *Barticheck* and *Marshall-Silver* indicates that appellants' allegations meet the pattern requirement.

Appendix B

First, whereas the *Marshall-Silver* court identified only two active perpetrators and the *Barticheck* court identified two corporate entities and "several individuals."[16] the number of alleged perpetrators here includes C-E and four of its officers. Next, despite C-E's attempts to characterize the acts as a "single event," the number of acts involving Saporito and the other appellants included at least the thirty-two inducements to retire, as well as perhaps the acts of informing other individuals that they should postpone retirement until the second plan was offered. By comparison, in *Barticheck* approximately twenty-three acts were found sufficient to constitute a pattern, whereas *Marshall-Silver* involved only six. Similarly, the number of victims in the case *sub judice* includes the thirty-two plaintiff-employees, as compared to twenty in *Barticheck* and one in *Marshall-Silver*. Moreover, regarding "the similarity of the acts," the acts alleged by appellants -- the fraudulent inducements to retire under the less lucrative plan -- were virtually identical to one another. So too were the wrongful acts held sufficient in *Barticheck*, which involved the fraudulent inducement to invest in the fraudulent partnership. Finally, the length of time involved here was roughly six months, the *Marshall-Silver* activities extended over a similar period, and it is unclear how long the activities extended in *Barticheck*.[17]

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16. The opinion mentions "several individuals," 832 F.2d at 39, and the factual discussion mentions two individuals, a vice president and the vice chairman of the bank. Thus it is unclear whether "several individuals" includes just the two bank officers or whether others were involved.

17. The sixth factor identified in *Barticheck*, the character of the activity, may be relevant to the pattern determination in some cases, but given that the other factors support our conclusion that

On the whole, we are satisfied that, if proven, the multiple inducements to retire made to at least thirty-two individuals over an extended period satisfy the "continuity plus relationship" requirement, and thus constitute a "pattern of racketeering activity."

C. *Combustion Engineering's Liability*

Appellants alleged in Count III that the individual defendants "each violated 18 U.S.C. § 1962(c)," and that C-E "itself violated 18 U.S.C. 1962." J.A. at 58. Section 1962(c) states:

> It shall be unlawful for any *person* employed by or associated with any *enterprise* engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of *such enterprise's* affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. 1962(c) (emphasis added). C-E contends that, although the district court did not reach the issue, its dismissal of Count III was proper as to C-E because civil RICO § 1962(c) makes it unlawful for "persons" to engage in certain criminal activity, yet

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appellants have properly alleged a pattern, and its equivocal import, *see infra*, we need not decide its impact here. We note that the conduct alleged here amounted to an attempt to induce appellants to retire early in order to deny plaintiffs' participation in the more lucrative retirement plan. Even if this activity may have a legitimate purpose where a company must scale back its workforce by inducing employees to retire, the allegations that certain employees were secretly told to wait for the second plan may raise the allegations to the level of fraud. *See supra* p. 7. *Bartlecheck* involved a scheme to defraud investors via a fraudulent partnership, where there could have been no legitimate purpose for the scheme. *Marshall-Silver*, on the other hand, involved allegations of fraud in the filing of a bankruptcy petition, which could have been the result of an overly aggressive attempt to perform a legitimate act -- to gain payment for work performed. This case falls somewhere in between.

appellants pleaded that C-E was not a person but an "enterprise." In *B.F. Hirsch v. Enright Refining Co.*, 751 F.2d 628 (3d Cir. 1984), we held that for the purposes of § 1962(c) a person and an enterprise may not be the same entity, hence that an enterprise may not be held liable under the section. Appellants agree that their pleadings designated C-E as an enterprise and not as a person, but make two responses.

First, appellants respond that C-E can still be held liable under the doctrine of respondeat superior. However, we held in *Petro-Tech, Inc. v. Western Co. of North America*, 824 F.2d 1349, 1358 (3d Cir. 1987), that although "the doctrine of respondeat superior may be applied under RICO where the structure of the statute does not otherwise forbid it," the doctrine may not be applied to actions under § 1962(c). Second, in the event respondeat superior liability is unavailable, appellants contend that Count III refers to § 1962 "generally" and not specifically to § 1962(c). Although appellants do not indicate which subsection Count III refers to, we note that 1962(a) provides in relevant part:

> It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity ... to use or invest, directly or indirectly, any part of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities which affect, interstate or foreign commerce.

We observed in *Petro-Tech* that the language of § 1962(a) differs from the language in § 1962(c), and that "'[s]ubsection (a) does not contain any of the language in subsection (c) which suggests that the liable person and the enterprise must be separate.'" 824 F.2d at 1360 (quoting *Haroco, Inc. v. American*

Nat'l Bank & Trust Co., 747 F.2d 384, 402 (7th Cir.), *aff'd per curiam* 473 U.S. 606 (1985)).

As a result, we held in *Petro-Tech* that "so long as the enterprise does in fact benefit from the racketeering activity challenged, there is no reason why we must ignore the corporation's role in the activity, if any, and no reason why an injured third party may not recover from the enterprise." 824 F.2d at 1361. However, because Count III does not specify whether appellants are claiming under § 1962(a) or § 1962(c), we conclude that there was insufficient information to determine whether Count III should have been dismissed as to C-E. We will therefore reverse the district court's dismissal of Count III and remand with instructions to allow appellants to amend the complaint to provide greater specificity.

VI. CONCLUSION

For the reasons stated above, we will affirm the district court's judgment insofar as it dismissed Count I of the complaint, reverse the judgment insofar as it dismissed Counts II and III, and remand for further proceedings consistent with this opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

APPENDIX C — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED MARCH 29, 1988

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-5144

ARSENIO C. SAPORITO, PASQUALE F. AMBROSIO, ALFRED GRANT BAUM, FREDERICK BETZ, ROSE BOCHICCHIO, WILLIAM FLOYD BURROUGHS, AMERIGO BURRUANO, EDWIN B. CARLSON, WILLIAM F. CHEPERAK, GEORGE F. CROWLEY, VERNON D. DAVIS, JOHN FRANCIS DeMAR, FRED DIAMOND, NORMA LEE DYER, MURRAY S. GOTTLIEB, SVANTE HUMBLA, EDWARD F. JEDZINIAK, ALDA YVONNE KYLE, CHARLES PHILIP MARION, LOUIS MARSHALL, RICHARD MARTONE, PETER JAMES MIKEDES, ANTHONY J. MORRELL, PER OLOF EINER REICH, ROBERT ROBIE, HAROLD RODRIGUEZ, TIM SHAUNFIELD, MARY S. SIEGEL, RICHARD IVER SWARTZ, MORRIS SWERLIN, HUAN YIN WANG, JESS V. ZICCARELLO,

Appellants

v.

COMBUSTION ENGINEERING INC., CHARLES E. HUGEL, DONALD C. TAYLOR, SVEH A. KREIPKE and C. L. BEKKEDAHL,

Appellees

Appendix C

On Appeal From the United States District Court
for the District of New Jersey
(D.C. Civil No. 86-1998)

Present: BECKER, SCIRICA and ROSENN, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel October 5, 1987.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered December 16, 1986, and January 30, 1987, be, and the same are hereby affirmed insofar as Count I of the complaint was dismissed, reversed insofar as Counts II and III of the complaint were dismissed, and the cause is remanded to the said District Court for further proceedings consistent with the opinion of this Court.

ATTEST:

s/ Sally Mrvos
Clerk

March 29, 1988

Certified as a true copy and issued
in lieu of a formal mandate on May 9, 1988.

Appendix C

Test:

s/ M. Elizabeth Ferguson
Chief Deputy Clerk,
United States Court of Appeals,
for the Third Circuit

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY GRANTING MOTION FOR SUMMARY JUDGMENT DATED JANUARY 29, 1987

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 86-1998 (CSF)

ARSENIO C. SAPORITO, et al,

Plaintiffs,

vs.

COMBUSTION ENGINEERING, INC., CHARLES E. HUGEL, DONALD C. TAYLOR, SVEN A. KREIPKE and C. L. BEKKEDAHL,

Defendants.

ORDER FOR RECONSIDERATION

This matter being opened to the Court upon a Motion of Apruzzese, McDermott, Mastro & Murphy, attorneys for defendants, for an Order for Reconsideration of an Order entered by the Court on December 16, 1986, and the Court having considered the moving papers and the applicable law, and for good cause shown;

It is, on this 29th day of January 1987 ORDERED that defendants' Motion for Summary Judgment is granted.

Appendix D

s/ Clarkson S. Fisher
U.S.D.J.

ENTERED
on
THE DOCKET
on 1/30/87
WILLIAM T. WALSH, CLERK
by SHARON SYPHETT
(Deputy Clerk)

APPENDIX E — LETTER OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED JANUARY 29, 1987

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
NEWARK N. J. 07101

Chambers Of
CLARKSON S. FISHER
CHIEF JUDGE

Please reply to:
Room 235
402 East State Street
Trenton, N.J. 08605

LETTER OPINION

January 29, 1987

Margaret L. Moses, Esq.
One Gateway Center
Suite 2600
Newark, New Jersey 07102

Vladeck, Waldman, Elias & Engelhard, P.C.
Attention: Joseph J. Garcia, Esq.
1501 Broadway, Suite 800
New York, New York 10036

Apruzzese, McDermott, Mastro & Murphy
Attention: David S. Cramp, Esq.
510 Morris Avenue
P.O. Box 329
Springfield, New Jersey 07081

Re: Saporito v. Combustion Engineering, Inc.
Civil Action No. 86-1998

Appendix E

Dear Counsel:

This is a motion by defendants for reconsideration of this Court's December 3, 1986, decision dismissing Counts One and Two of the Complaint. Defendants contend that this Court was incorrect in not dismissing the first two counts, which assert claims that defendants violated ERISA, and requests reconsideration. For the following reasons defendants' motion is granted.

Local Rule 12-I states in pertinent part that the party moving for reconsideration shall submit "a memorandum setting forth concisely the matters or controlling decisions which counsel believes the court has overlooked." In support of their motion, defendants contend that there is no standing under ERISA for the following reasons: (1) plaintiff's received every benefit to which they are entitled under the Voluntary Early Separation Plan (VESP). Plaintiffs are precluded from bringing an action under ERISA seeking extra-contract damages, as they must do under the Count alleging a violation of VESP; (2) the Court has determined that plaintiffs were not participants under the Voluntary Separation Incentive Plan and would therefore not have standing: and (3) because the relief is sought against individual defendants as VESP fiduciaries, plaintiffs have no standing.

This Court determined that plaintiffs did in fact elect early retirement so as to become beneficiaries of the VESP plan. The Court found no fiduciary duty on the part of defendants to disclose information on an early retirement plan that was only in the planning stages at the time of plaintiffs' retirement. "It is not a violation of ERISA to fail to furnish information regarding amendments before these amendents are put into effect." *Stanton v. Gulf Oil Corp.*, 729 F.2d 432, 435 (4th Cir. 1986).

Appendix E

The Court improvidently included, at pages 8 and 9, lines 21 through 25, "However, Plaintiffs allege C-E disclosed the planning and development of VSIP to other C-E employees allowing those chosen employees to make a choice between VESP or VSIP. Because the allegations of a complaint are to be accepted as true, Plaintiffs should be allowed to proceed further with the litigation." This Court recalls this statement from its Opinion dated December 3, 1986.

As is made clear by this Court's Opinion prior to this statement, plaintiffs are not participants within the meaning of 29 U.S.C. 1002, and summary judgment is granted in favor of defendants.

Very truly yours,

s/ Clarkson S. Fisher
Clarkson S. Fisher
Chief Judge

Original to Clerk

APPENDIX F — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED DECEMBER 3, 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 86-1998

ARSENIO C. SAPARITO, et al.,

Plaintiffs,

v.

COMBUSTION ENGINEERING INC., et al.,

Defendants.

TRANSCRIPT OF OPINION

Trenton, New Jersey
December 3, 1986

BEFORE:

THE HON. CLARKSON S. FISHER, CHIEF JUDGE, U.S.D.C.

APPEARANCES:

MARGARET L. MOSES, ESQUIRE,
and
VLADECK, WALDMAN, ELIAS
& ENGELHARD, ESQS.,
BY: JUDITH VLADECK, ESQ. and
JOSEPH GARCIA, ESQ., (N.Y. Bar)
Attorneys for Plaintiffs

Appendix F

APPRUZZESE, McDERMOTT, MASTRO
& MURPHY, ESQS.,
BY: DAVID S. CRAMP, ESQ.,
Attorney for Defendants.

Reported by:
CHARLES P. McGUIRE, C.S.R.
Official Court Reporter

* * *

THE COURT: Presently before the Court is Defendant, Combustion Engineering, Incorporated's motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b) for failure to state a claim for which relief can be granted and for lack of subject matter jurisdiction. The motion to dismiss arises from an action in which 32 named Plaintiffs alleged that Defendants violated the Employee Retirement Income Security Act, (ERISA), 29 U.S.C. Sections 1001 et seq. and violated the Racketeer Influenced and Corruption Organizations Act, 18 U.S.C. Section 1962.

The 32 Plaintiffs are all former employees of C-E who in February 1985 took early retirement pursuant to C-E's Voluntary Early Separation Plan (VESP). VESP was limited to eligible active employees of C-E working in the C-E Engineering and Construction Group. On or about February 4, 1985, Plaintiffs were notified by C-E of the VESP plan. Under the terms of the plan, employees had until February 15, 1985, to exercise their option and agree to retire by February 28, 1985. Plaintiffs allege this they accepted because "Defendants and various officers, managers and supervisors . . . threaten[ed] or impl[ied] that [Plaintiffs] would be laid off if they did not accept the plan." (Complaint, paragraph 20).

Appendix F

Plaintiffs allege that during this same period of time, Defendants designed another early retirement incentive plan, the Voluntary Separation Incentive Plan (VSIP). This was to be offered after the VESP election period had expired. The benefits under VSIP were far more valuable than the benefits offered under VESP. The VSIP benefits are alleged to have been more valuable than the benefits under VESP. All of the Plaintiffs retired on February 28, 1985. Subsequent to Plaintiffs' retirement, the VSIP plan was made public and offered to C-E employees in May of 1985. Plaintiffs who had retired on February 28, 1985, sought to participate in the VSIP program. C-E denied their requests.

When a court is to decide a 12(b)(6) motion, factual allegations of the complaint are to be accepted as true and the complaint should be dismissed only if it appears to a certainty that no relief could be granted under any set of facts which could be proved. Reasonable factual inferences are to be drawn to aid the pleader. D.P. Enterprises v. Bucks County Community College, 725 F.2d 943, 944 (3rd Circuit 1984). A dismissal of a complaint for failure to state a claim upon which relief can be granted is not favored by the Court and the burden that no claim has been stated is upon the moving party. Johnson v. Carter, 620 F.2d 29, 31, (3rd Cir. 1980).

> When a Federal Court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a Plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that recovery is very remote and unlikely but that is not the test. Moreover, it is

> well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader.

Scheuer v. Rhodes, 416 U.S. 232, 236 (1973).

When considering a 12(b)(6) motion, a court is only to consider the matters on the pleadings. Once the Court does consider matters outside the pleadings it must convert the motion into one for summary judgment. Sprague v. Fitzpatrick, 546 F.2d 560, 573 n.4. (3rd Cir. 1976).

The contention of C-E is that Plaintiffs lack standing to raise this ERISA action pursuant to 29 U.S.C. Section 1132(a). (See Footnote 1) Title 29 U.S.C. Section 1132(a)(1)(A) authorizes a "participant or beneficiary" to bring a civil action against the plan administrator to recover statutory damages for violating the duty to disclose plan documents under Section 1132(c).

Section 1132(a)(2) authorizes either the Secretary of Labor or a "participant, beneficiary or fiduciary" to bring a civil action for relief from breaches of fiduciary duty that the plan administrator has committed in violation of Section 1109(a).

The crux of the dispute is whether the Saparito Plaintiffs qualify as "participant[s]" within the meaning of ERISA. Title

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1. Determining whether Plaintiffs have standing is a "threshold question in every federal case [that] determine[es] power of the Court to entertain the suit. Warth v. Seldin, 422 U.S. 490, 498 (1975).

Appendix F

29 U.S.C. Section 1002(7) defines participants:

> [t]he term participant means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

Title 29 U.S.C. Section 1002(7). The C-E Defendants thus contend that the Saparito Plaintiffs are not participants because, as former employees whose vested benefits under the VESP plan have already been distributed in a lump sum, the Saparito Plaintiffs were not eligible to receive a benefit, or likely to become eligible, at the time they filed suit.

Whether the Plaintiffs may raise any issue of claimed breach of fiduciary duty is dependent on whether they have standing to sue under ERISA as participants in an employee benefit plan. Recently, several circuit courts of appeal have considered the standing issue when former employees are seeking benefits first made available after their termination from employment. The 5th Circuit has held that employees who take early retirement and elect to receive lump sum retirement benefits do not have standing to seek the increased payment made to later retirees or to challenge changes in the retirement plan. See Joseph v. New Orleans Electrical Pension & Retirement Plan, 754 F.2d 628, 630 (5th Circuit), cert. denied ____U.S.____, 106 S. Ct. 526 (1985); Yancy v. Petrofina, Inc., 768 F.2d 707, 708-09 (5th Cir. 1985). The 9th Circuit reached a similar result in Kuntz v. Reese, 785 F.2d 1410 (9th Cir. 1986), in which the Court concluded that former

employees whose benefits had already been distributed were not eligible to receive benefits or likely to become eligible for benefits, and thus were not "participants" with standing to bring ERISA claims. The premise of these opinions is that the entitlement to increased benefits had not become vested before the changes were made.

In Stanton v. Gulf Oil Corp., 792 F.2d 432 (4th Cir. 1986), the Fourth Circuit held that a former employee who took early retirement was not a participant in an employee severance benefits plan which went into effect after he retired. Before the Plaintiff in that case made a decision to take early retirement, he met with a human resources employee, who was a personal friend, to discuss the benefits. Mr. Stanton inquired if any changes in the retirement plan were contemplated. The local supervisor knew of no pending changes, and the Plaintiff signed his retirement papers, saying he expected to receive any later increased benefits. In fact, the Gulf Oil Board had already approved a new severance plan for designated employees taking voluntary early retirement. The plan was officially instituted on the very day of Stanton's retirement, was announced two months later, and became effective four months later. The plan was to apply only in cases when there was a permanent workforce reduction and when the company had advised the employee by personal letter that he or she was eligible.

Mr. Stanton argued that he was a participant in the plan because he may have become eligible to receive benefits but for his leaving his employment by electing early retirement, and because the extension of the plan to persons in his salary grade after he had retired put into effect a plan already adopted by the company. The Fourth Circuit rejected this argument because it would "impose participant status on every single employee who

but for some future contingency may become eligible" for benefits, a broad reading of "participant" the Court found unsupported by case law or the statute. Id. at 435.

The Court also found that a plan fiduciary's failure to give information regarding amendments to the plan before they are put into effect is no violation of ERISA. "This is so because the legislative intent of ERISA was not to assure the sanctity of early retirement expectations, but to safeguard accrued retirement benefits." Id. The Fourth Circuit held that because Stanton had retired before the plan was extended to individuals in his wage category and because Stanton had never received the requisite personal letter advising him that he was eligible, he was not a participant in the plan. ERISA did not mandate fiduciary duties to him as a nonparticipant.

Plaintiffs are alleging that C-E had misrepresented the VSIP plan and forced them to opt for early retirement under the VESP plan. Plaintiffs have also alleged that while the VESP plan was being offered to them, Defendants were developing the VSIP plan which was offered to C-E employees on May 20, 1985. Thus Plaintiffs contend that C-E and its employees not only had a fiduciary duty to disclose not only the VESP plan which was in existence but all other plans under development.

The Court does not agree with this contention. Plaintiffs were not participants in the VSIP plan. They had been informed as to the early retirement plan VESP. Plaintiffs elected early retirement so as to become beneficiaries of the VESP plan. On February 28, 1985, Plaintiffs did in fact retire and the VESP plan vested in the Plaintiffs in the form of a lump sum payment. On May 20, C-E offered its VSIP plan to qualified employees. As such, there was no fiduciary duty on the part of Defendants to

disclose information on an early retirement plan that was only in the planning stages at the time of Plaintiffs' retirement. However, Plaintiffs allege C-E disclosed the planning and development of VSIP to other C-E employees allowing those chosen employees to make a choice between VESP and VSIP. Because the allegations in a complaint are to be accepted as true, plaintiffs should be allowed to proceed further with the litigation. Defendants' motion to dismiss for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted is denied with regard to Counts 1 and 2.

In Count 3 of the complaint Plaintiffs raise R.I.C.O claims against Defendants. Title 18 U.S.C. Section 1964(c), the civil R.I.C.O. provision, creates a civil remedy for "[a]ny person injured in his business or property by reason of a violation of Section 1962 of this chapter . . ." Title 18 U.S.C. Section 1962 in turn declares that it shall be unlawful (1) for any person who has received income derived from a pattern of racketeering activity or collection of unlawful debt to use such income or its proceeds to acquire an interest in, to establish, or to operate any enterprise engaged in interstate commerce, see Section 1962(a); (2) for any person through a pattern of racketeering activity to acquire or maintain any interest in or control of an enterprise, see 1962(b); (3) for any person employed by or associated with any enterprise to conduct or participate in its affairs through a pattern of racketeering activity or collection of unlawful debt, see Section 1962(c); or (4) for any person to conspire to violate any of the Section's subsections, see Section 1962(d). The statute further specifies that a "pattern of racketeering activity" requires at least two acts of racketeering activity . . . the last of which occurred within 10 days . . . after the commission of a prior act of racketeering." 18 U.S.C. Section 1961(5).

Appendix F

> In their complaint Plaintiffs allege that Defendant's conduct in failing or refusing to disclose material information to each of the Plaintiffs during the opt-in period with the intention of inducing each of the Plaintiffs to elect to participate in VESP and to prevent Plaintiffs from obtaining the benefits offered under VSIP and by disclosing to certain C-E employees other than Plaintiffs the existence and imminent offering of VSIP during the VESP opt-in period each constitutes a separate and distinct violation of their fiduciary obligations to Plaintiffs and a scheme or artifice to defraud Plaintiffs within the meaning of 18 U.S.C. [Section] 1341.

[Complaint, Count 3, paragraph 69]. Presumably, the same acts of fraud will be proffered by Plaintiffs to establish a pattern of racketeering activity applicable to all Plaintiffs. Both parties cite the Court to Sedima, S.P.R.L. v. Imrex Co., Inc., ____ U.S. ____, 105 S. Ct. 3275 (1985). In Sedima the Court briefly addressed the issue of what constituted a pattern under 18 U.S.C. Section 1961(5). The Court reviewed the legislative history of R.I.C.O. and stated that two isolated acts of racketeering activity do not constitute a pattern. To establish a pattern there must be a showing of more than one racketeering activity and the threat of continuing activity. As an aid in interpreting R.I.C.O.'s pattern requirement, the Court quoted from 18 U.S.C. Section 3575(c): "Criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." Sedima at 3285 n.14.

Appendix F

None of the cases that Plaintiffs cite go to the proposition that only one act is necessary to establish a pattern adequate for an allegation of R.I.C.O. In Bank of America National Trust & Savings Association v. Touche Ross & Co., 782 F.2d 906 (11th Cir. 1986), the Court held that the bank's complaint was not deficient because of only one instance of mail fraud where Defendants placed a document in the mail. This is because the banks alleged that on seven occasions Defendants prepared false financial statements that they knew would be mailed to the banks. The banks thus alleged multiple acts in which the Court could see a pattern. Id. at 971. In Kronfeld v. First New Jersey National Bank, 638 F. Supp. 1454 (D.N.J. 1986), the Court held that the acts in question took place over a period of almost six years, all over the country, and injured approximately 1,400 individual investors, thus showing a pattern of criminal activity. Id. at 1472.

Plaintiffs if anything have alleged multiple acts in furtherance of a single scheme. In this Court's reading of Sedima, Plaintiffs must allege a pattern of criminal activity and not just multiple acts leading to allegedly one single plan or scheme. Count 3 is dismissed.

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